Dismissed
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Subm. Thurs
Jan. 3 1887

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 889.

N. L. McCARTHY, APPELLANT,

vs.

JOSEPH ALCIDE PROVOST ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 29, 1880.

SUPREME COURT OF THE UNITED STATES.

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a *Transcript of appeal, returnable to the Supreme Court of the United States on the second Monday of October*, 1880.

UNITED STATES OF AMERICA:

Circuit court of the United States in and for the 5th circuit & district of Louisiana.

N. L. McCARTHY
vs.
JOSEPH ALCIDE PROVOST ET AL. } No. 8670.

Messrs. Charles Louque and Thomas J. Semmes, for N. L. McCarthy, complainant, appellant.
Messrs. Kelly & Lazarus and Gabriel Fernandez, for J. Alcide Provost et als., defendants, appellees.

1 *Bill of complaint.—Filed February 12th*, 1879.

UNITED STATES OF AMERICA:

Circuit court of the United States in and for the 5th circuit & district of Louisiana.

N. L. McCARTHY
vs.
JOSEPH PROVOST ALCIDE ET AL. } No. 8670.

To the judges of the circuit court of the United States for the district of Louisiana:

N. L. McCarthy, of Hays County, and a citizen of the State of Texas, brings this, his bill, against Edward N. Ratier, of Jeannerette, and a citizen of Louisiana; Mathilde Ratier, of St. James Parish, a citizen of Louisiana; Ovide B. Doumengé, resident of New Iberia, a citizen of Louisiana; Marie Doumengé, of New Iberia, a citizen of Louisiana; Alice Doumengé & Clement Darby, her husband, residents of New
2 Iberia and citizens of Louisiana; Celestine Loisel and her husband, John M. Vaughn, of New Iberia Parish, and citizens of Louisiana; Cecile Duperier and her husband, L. P. Renoudet, residents of New Iberia and citizens of Louisiana; Celestine McCarthy and her husband, A. H. Brown, residents of Iberia Parish and citizens of Louisiana; Frederick Ansley and George Ansley, infants, residing and being citizens of the State of Florida, with Wm. F. Ansley, their father, a citizen of said State; Kate Ansley and her husband, Taylor, whose first name is unknown to orator, residents of and citizens of the State of New York; Peyton McCarthy, J. D. McCarthy, and Ovide McCarthy, infants, residents of Shelby County and citizens of Tennessee; Laurence T. Burnett, a resident of New Orleans and a citizen of Louisiana; Clara McCarthy and her husband, M. M. Hartman, residents of Vermillion Parish and citizens of Louisiana; Octave Pellerin, a resident of Jeannerette and a citizen of Louisiana; Jos. Amédé Provost, L. Oscar Provost, M.
3 Virginie Provost, infants, residing with their father, Edmond Provost, jr., in Jeannerette, and citizens of Louisiana; Alexandre Pellerin, of Jeannerette, and a citizen of Louisiana; Edmond Pellerin, an infant, represented by Octave Pellerin, a resident of Jeannerette,

and a citizen of Louisiana; Azema Pellerin and her husband, Alcide Borel, of Jeannerette, and citizens of Louisiana; Celina Pellerin, Celeste Pellerin, Pellerin, infants, residing in Jeannerette with their father, St. Ives Provost, and citizens of Louisiana; Louno Pellerin, of Glencoe, a citizen of Louisiana; Balthazar Pellerin, of Loreauville, and citizen of Louisiana; Edmonia Pellerin, Louis Pellerin, Eléonide Pellerin, Marie Lodoïsca Pellerin and her husband, Theogène Lognon, Ovide Pellerin, Nicholas Lognon, Eugenia Lognon, all residents of Jeannerette, and citizens of Louisiana; Jules Pellerin, Alcée Judice, Felicia Judice and her husband, Belisaire Borel, all residents of Jeannerette, and citizens of Louisiana; Nicholas Provost, jr., Alcibiade Judice,
4 both of Jeannerette, and citizens of Louisiana; Gustave Le Blanc, Dupré Le Blanc, Elina Le Blanc, Azema Le Blanc, all residents of Broussardville, and citizens of Louisiana; Alzire Pellerin and her husband, St. Aubin Lognon, residents of St. Mary, and citizens of Louisiana; Octave Pellerin, Adrien Pellerin, Edmond Pellerin, all residents of Jeannerette, and citizens of Louisiana; Coralie Provost and her husband, Hipolyte Larenaudie, of New Iberia, and citizens of Louisiana; Felicie Provost, wife of Michel Krepper, Godefroy Provost, all residents of Jeannerette, and citizens of Louisiana; Gracieuse Provost and her husband, Norbert Provost, Stanislas Provost and Tullus Provost, infants, having for tutor Emile Druilhet, residents of Jeannerette, and citizens of Louisiana; Siléнie Provost and her husband, Samuel Walker, of Jeannerette, and citizens of Louisiana; Clet Provost, of Loreauville, a citizen of Louisiana; Eleonore Le Blanc, of Jeannerette, and citizen of Louisiana; James Brown, of Jeannerette, and citizen of Lou-
5 isiana; Lisima Provost and her husband, Thomas Scott, of New York City, and citizens of the State of New York; Cecilia Provost, wife of Numa Lange, of Jeannerette, and citizens of Louisiana; Odile Provost, and her husband, Azémé Borel, of Jeannerette, and citizens of Louisiana; Clara Provost and her husband, L. G. Judice, of St. Martinsville, and citizens of Louisiana; Edmond Provost, of Jeannerette, and a citizen of Louisiana; Celestine Provost, and her husband, John G. Harry, of New Iberia, and citizens of Louisiana; Louisa Provost and her husband, Alfred Bonin, of St. Martinsville, and citizens of Louisiana; Eulalie Delahoussaye, of St. Martinsville, and a citizen of Louisiana; Victoria Provost and her husband, L. P. Provost, of Jeannerette, and citizens of Louisiana; Arthur Provost, of Jeannerette, and citizen of Louisiana; Marie Jeanne Provost and her husband, John H. Ford, residents of New Orleans, and citizens of Louisiana; J. Alcide Provost, of Jeannerette, and citizen of Louisiana; Marie
6 Provost and her husband, Emile Druilhet, of Jeannerette, and citizens of Louisiana; Desiré Guiberteau, Coralie Guiberteau and her husband, Auguste Esteve, all three of Jeannerette, and citizens of Louisiana; Antoinette Provost and her husband, Jean Baptiste Guiberteau, residents and citizens of France; Louis Philémon Provost, of Jeannerette, and a citizen of Louisiana; Nicholas Provost, sr., of Jeannerette, a citizen of Louisiana; Ophelia Provost and her husband, Alcibiade Judice, of Jeannerette, and citizens of Louisiana; Alphonse Moore, of Lake Simonet, a citizen of Louisiana; Palmyre Gauffrau and her husband, Edward Provost, of Jeannerette, and citizens of Louisiana; Belisaire Borel, of Jeannerette, a citizen of Louisiana; Pamela Borel and her husband, Valerien Broussard, of Loreauville, and citizens of Louisiana; Marie Eulalie Vigneaud and her husband, J. B. Hebert, of Bayou Salé, and citizens of Louisiana; Ophelia Vigneaud, wife of Sosthène Judice, of Jeannerette, and citizens of

Louisiana; Nicholas Vigneaud, of New Orleans, and a
7 citizen of Louisiana; William Hudson, A. L. Monnot, Jno. A. Webster, George Sollinger, Jas. Bridell, Alex. Monion, Antoine Moresie, Mrs. Pierre Lassus and her husband Pierre Lassus, Villeré Durocher, Philip Richardson, Ludger Schexnayder, Narcisse Druilhet, A. J. Simmoneau, A. L. Provost, Mrs. W. J. Poteet, James Poteet, Aristide Landry, F. Petitfils, Demas Mahlet, James Irvine, Sam. Napier, William Gausson, Louis Tageant, F. Bourlié, George Harris, Adolph Tefflein, Otto Weber, Samuel Patrick, Jake Weber, —— Jaquenin, Mrs. Henkel, J. A. Breaux, Louis Widsworth, Anner Schexnaider, Jno. Petitfils, Laurent Col, Apolinaire Schexnaider, Philip Bertaud, Mrs. Peter Ankle and her husband, Edgard Alexander, Gaspard Bouvet, A. Bourlie, Dider, Jacques Jacqui, Laurent Hilaire, Moses Porter, Pierre Lindose, William Gusse, Augustine, Noré Wash Washington, Joe Cloyde, Paul Richards, Jno. Brown, Valsin Karison, Jno. Green, Tom Brown, Alexander, Sam. Teave, sr., Scipion Vince, Jean Baptiste Winderder, Guillaume Netton, Alexis, Paul Irvine, The-
8 odore, Julien Barabeau & Co., H. Petitfils and Mrs. George Sollinger, all of whom are of Jeannerette, and citizens of Louisiana, and thereupon your orator complains and says:

That Nicholos Provost and Marie Jeanne Provost, his wife, departed this life in the parish of Saint Mary intestate and possessed of the following described property:

A certain tract of land situate in the parish of Saint Mary now known as Iberia Parish, on both sides of Bayou Têche, adjoining the lands lately belonging to Pierre Etier on the lower side, and the lands lately belonging to Eugene Borel on the upper side, measuring fifteen arpents front on Bayou Têche by forty arpents in depth on each side of said bayou, with all the buildings and improvements thereon acquired by Nicholas Provost on the 27th of December, 1800.

Another tract of land situate on both sides of Bayou Têche, adjoining the land of Eugene Borel on the lower side and the land of Madam
9 Jean Louis Hebert on the upper side, containing seventy-eight and three-fourths arpents front on said bayou by forty arpents in depth on each side of said bayou, with all the improvements thereon.

That your orator is one of the grandchildren and forced heirs of said Nicholas Provost and his wife, Marie Jeanne, and as such is entitled to one two hundred fortieth ($\frac{1}{240}$) part of the said above described property.

That the successions of said Nicholas Provost and wife were opened in the probate court of the parish of Saint Mary and the land above described was inventoried therein as part of their estate and has never been disposed of.

That the rents and revenues of the most valuable part of said lands are collected by Joseph Alcide Provost and used exclusively for his own benefit, and is thus in danger of being totally lost to your orator and his co-heirs.

That said property is not susceptible, in the opinion of your
10 orator, of a division in kind, and it will be for the benefit of said defendants as well as complainant that the said property be sold to effect this partition.

That your orator well hoped that no dispute would have arisen touching the said above described property, and that he would peaceably have been allowed to divide said lands with his co-heirs and co-proprietors above named, and that they would have consented to the reasonable request made by your orator for a partition thereof as in conscience and equity they ought to have done.

But now so it is, may it please your honors, that the parties made defendants herein and above named, combining and confederating with divers other persons, at present unknown to your orator, whose names, when discovered, your orator prays he may be admitted to insert herein with apt words, to charge them as parties defendants hereto and
11 contriving now to wrong and injure and defraud your orator in the premises; the said defendants, and more especially Joseph Alcide Provost, refuse to comply with such request; they and he at times pretend that said property is owned by them, and more especially by said Joseph Alcide Provost, to the exclusion of your orator, pretending that a tax sale was made on the 8th of December, 1873, of said property, and that the said tax title was duly confirmed by the State auditor.

That the said defendants, at other times, allege and pretend that they have acquired said property by the prescription acquirendi causa, whereas your orator charges the contrary thereof to be the truth, and that his rights in and to said property were never in any manner divested by the tax sale above referred to; that by the express terms of said tax collector's deed, no other or greater rights than those of Ursin Provost have or purport to have been transferred; that if said tax deed
12 is in any manner valid it in no manner affects the title and rights of your orator; but your orator furthermore charges, and if need be he alleges, that the said tax sale is an absolute nullity, for the following reasons:

1°. Because a proper assessment was never made of said property, and the nullity of said assessment carries with it the nullity of the tax sale.

2°. Because the printed notice of demand was never made nor published.

3°. Because the movables were not first seized, as directed by the statutes under which said sale was made.

4°. Because no proper notice of demand nor of seizure was ever made.

5°. Because no possession was ever taken of said property by the tax collector.

6°. Because no seizure was ever recorded in the recorder's office, as provided by law.

7°. Because said sale was not published three times during ten days.

13 8°. Because the price bid, and purporting to have been paid, was entirely inadequate to the value of the property, and was not equal to its tenth part.

9°. Because J. A. Provost, one of relator's co-heirs, who was in possession, was in duty bound to preserve the property, instead of which he concocted the tax sale for the sole purpose of defrauding your orator and his other co-heirs of said property.

That the pretence of title set up by reason of prescription has no foundation in fact.

Your orator alleges the truth to be that Ursin Provost and Jos. Alcide Provost were both heirs of the late Nicholas Provost and his wife, and as such were entitled to the ownership of an undivided portion of his estate; that Ursin Provost resided on said land, as he had the right to do, with no intention of acquiring your relator's title; that Marie Jeanne Provost had the usufruct of said land, and she permitted Ursin Provost to remain thereon with her for the sake
14 of companionship, and perhaps as a help to him; that the time

during which said Ursin Provost remained on said land did not enure to the benefit of Joseph Alcide Provost.

That furthermore there never was any incipient point at which prescription commenced to run; that the time required to prescribe has never run.

That various suits and proceedings were had in the district and parish courts of the parish of Iberia, which interrupted said prescription.

That the actings, doings, and pretences of said defendants are contrary to equity and good conscience, and to the manifest wrong, injury, and oppression of your orator in the premises.

In consideration whereof, and for as much as your orator is entirely remediless in the premises according to the strict rules of the common or civil law, and can only have relief in a court of equity, where
15 matters of this nature are properly cognizable and relievable.

That the value of the property sought to be partitioned amounts to more than five thousand dollars.

To the end, therefore, that said defendants, Joseph Alcide Provost, and such as hold under him and Ursin Provost, may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective oaths and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereinunder written they are respectively required to answer; that is to say:

1. Whether it is not a fact that Ursin Provost lived with his mother, Marie Jeanne Provost, till her death, in 1819, and during that time never exercised any authority as owner?

2. Whether Marie Jeanne Provost, during her lifetime, did not
16 act as sole owner of said property?

3. Whether several suits were not filed in the district and parish courts of the parish of Iberia, claiming a partition of said property?

4. Whether the tax sale made in 1873 was not made by the tax-collector at the special request of Ursin Provost and Joseph Alcide Provost, or either of them?

5. Whether the proceedings for the said tax sale were not had for the purpose of defrauding all the co heirs of said Ursin Provost of their share in the property above described.

6. Whether all the rents and revenues of said property since 1873 have not been received exclusively by J. Alcide Provost, and used for his own benefit?

7. Whether the said rents and revenues did not amount net to the sum of six thousand dollars per annum during and since 1873?

8°. Whether they are not aware that said lands still belong to
17 your orator and his co-heirs and knew not said fact when they entered in possession? Said defendants being requested to produce the titles on which they rely.

And that said defendants may be compelled to render a full, fair, and just account of the rents and revenues derived from said property from the time the same has been in their possession, and that a commission may issue out of this honorable court, to divide, separate, and allot two hundred and thirty-nine two hundred and fortieth ($\frac{239}{240}$) part of said above-described property from the other parts thereof, to be held and enjoyed by the said defendants and their heirs in severalty, and that your orator, his heirs and assigns, may be decreed to enjoy the other one-two

hundred and fortieth part in severalty from the said defendants, and that proper conveyances may be executed accordingly, and in case the proof should show the said property not to be susceptible of a
18 division in kind that a decree may be passed for the sale of said land under the direction of this honorable court, on the most advantageous terms, such as one-half cash and the balance in six, twelve, and eighteen months, with notes secured by special mortgage and vendor's lien, bearing 8 % interest per annum from date till paid; ten per cent. attorney's fees, in case of suit, the property to be kept insured to the amount of the notes; and that the proceeds of sale may be distributed among the parties above mentioned, in proportion to their respective interest; and your orator further prays that a receiver be appointed to receive the rents and revenues to accrue pending this suit; and he further prays that he may have such further order and decree and general relief in the matters aforesaid as to your honors may seem meet and the circumstances of this case require.

19 May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America to be directed to said Edward N. Ratier, Celestine Loisel and her husband, John M. Vaughn, Mathilde Ratier, Ovide B. Doumengé, Marie Doumengé, Alice Doumengé and her husband, Clement Darby, Cecile Duperier and her husband, L. P. Renoudet, Celestine McCarthy and her husband, A. H. Brown, Lawrence T. Burnett, Clara McCarthy and her husband, M. M. Hartman, Octave Pellerin, Alexandre Pellerin, Azema Pellerin and her husband, Alcide Borel, Louno Pellerin, Balthazar Pellerin, Edmond Pellerin, Louis Pellerin, Eleonide Pellerin, Marie Lodoïsca Pellerin and her husband, Thèogene Lognon, Ovide Pellerin, Nicholas Lognon, Eugenia Lognon, Jules Pellerin, Alice Judice, Felicia Judice, Nicholas Provost, jr., Alcibiade Judice, Gusta. e LeBlanc, Dupré LeBlanc, Elina LeBlanc, Azema LeBlanc, Alzire Pellerin and her husband, St. Aubin Lognon, Octave Pellerin, Adrien Pellerin,
20 Edmond Pellerin, Coralie Provost and her husband, Hypolite Larenaudie, Felicie Provost and her husband, Michel Krepper, Godefroy Provost, Gracieuse Provost and her husband, Silenie Provost and her husband, Samuel Walker, Clet Provost, Edward Provost, Eleonore LeBlanc and her husband, Euphemon Richard, James Brown, Cecilia Provost and her husband, Numa Lange, Odile Provost and her husband, Azema Borel, Clara Provost and her husband, L. G. Judice, Edmond Provost, Celestine Provost and her husband, John G. Harry, Louisa Provost and her husband, Alfred Bonin, Eulalie Delahoussaye, Victoria Provost and her husband, L. P. Provost, Arthur Provost, Marie Jeanne Provost and her husband, John H. Ford, Joseph Alcide Provost, Marie Provost and her husband, Emile Druilhet, Desiré Guiberteau, Coralie Guiberteau and her husband, Auguste Esteve, Louis Philemon Provost, Nicholas Provost, sr., Ophelia Provost and her husband, Alcibiade Judice, Alphonse Moore, Palmyre Gauffrau and
21 her husband, Edouard Provost, Belisaire Borel, Pamela Borel and her husband, Valérien Broussard, Marie Eulalie Vigneaud and her husband, J. B. Hebert, Ophelia Vigneaud and her husband, Sosthene Judice, Nicholas Vigneaud, William Hudson, A. L. Monnot, John N. Webster, George Sollinger, Jas. Bridell, Alex. Monin, Antoine Moressie, Mrs. Pierre Lassus and her husband, Pierre Lassus, Villere Durocher, Philip Richardson, Ludger Schexnaydre, Narcisse Druilhet, A. J. Smimoneau, A. L. Provost, Mrs. W. J. Poteet, James Poteet, Aristide Landry, F. Petitfils, Demas Malhet, James Irvine, Sam. Napier, William Gausson, Louis Tageaut, F. Bourlie, George Harris, Adolph Tefflein,

Otto Weber, Samuel Patrick, Jake Weber, Jaquenin, Mrs. Henkel, J. A. Breaux, Louis Widsworth, Anner Schexnaydre, John Petitfils, Laurent Col, Apolinaire Schexnaydre, Philip Bertaud, Mrs. Peter Ankle and her husband, Peter Ankle, Edgard Alexandre, Gaspard Bouvet, A. Bourtie, Didier, Jacques Jacqui, Laurent Hilaire, Moses Porter, Pierre Lindose, William Gusse, Augustine, Noré Wash
22 Washington, Joe Cloyde, Paul Richards, John Brown, Valsin Harrison, Jno. Green, Tom Brown, Alexandre, Sam Teave, sr., Scipion Vince, Jean Baptiste Winderder, Guillaume Netton, Alexis, Paul Irvine, Theodore, Julien Barabau & Co., H. E. Petitfils, Mrs. George Sollinger and her husband.

That a commission issue to three persons residing at the place of residence of the following named infants, authorizing them or any two of them to go to said minors and appoint a guardian for the purpose of answering and defending this suit, and also to take the answer and return it to this court, to wit:

Frederick Ansley and George Ansley, infants of citizens of Florida, residing with their father, Wm. F. Ansley, Peyton McCarthy, J. D. McCarthy and Ovide McCarthy, of Shelby County, Tennessee, Joseph Amedée Provost, L. Oscar Provost, and M. Virginie Provost, residing in Jeannerette, with their father Edmond Pro-
23 vost, jr., Edmond Pellerin, represented by Octave Pellerin, his tutor, residing in Jeannerette, Celima Provost, Celeste Provost, Provost, residing in Jeannerette with their father, St. Ives Provost, Norbert Provost, Stanislas Provost, Tullus Provost, residing in Jeannerette, and having for their tutor Emile Druilhet of the same place.

That an order of publication giving notice to the hereinafter mentioned non-residents of the substance and object of this bill, and warn-
3 ing them to appear in this court in person, or by solicitor, on or before a certain day to answer the premises and show cause, if any they have, or why a decree ought not to pass as prayed, to wit:

Wm. F. Ansley, of Florida, Lisima Provost and her husband, Thomas Scott, residents of New York City and State, Kate Ansley and her husband, Taylor, of New York City and State, Antoinette Provost and her husband, Jean Baptiste Guiberteau, of , in the Republic of France, and as in duty bound, &c.

(Signed)

CH'S LOUQUE,
Solicitor for Complainant.

24 NOTE.—The defendants Joseph Alcide Provost, Wm. Hudson, A. L. Monnot, Jno. N. Webster, George Sollinger, Jas. Bridell, Alex. Monin, Antoine Morésie, Mrs. Pierre Lassus, Villere Durocher, Philip Richardson, Ludger Schexnaydre, Narcisse Druilhet, A. J. Simmoneau, A. L. Provost, Mrs. W. J. Poteet, Aristide Landry, F. Petitfils, Demas Mahlet, James Irvine, Sam Napier, William Gausson, Louis Tageaut, F. Bourlie, George Harris, Adolph Yefflein, Otto Weber, Samuel Patrick, Jake Weber, Jaquenin, Mrs. Henkel, J. A. Breux, Louis Widsworth, Anner Schexnaydre, Jno. Petitfils, Laurent Col, Apolinaire Schexnaydre, Philip Bertaud, Mrs. Peter Ankle, Edgard Alexandre, Gaspard Bouvet, A. Bourlie, Didier, Jacques Jacqui, Laurent Hilaire, Moses Porter, Pierre Lindose, William Gusse, Augustine, Nore Wash Washington, Joe Cloyde, Paul Richards, Jno. Brown, Valsin Karison, Jno. Green, Tom Brown, Alexandre, Sam Teave, sr., Scipion Vince, Jean Baptiste Winderder, Guillaume
25 Netton, Alexis, Paul Irvine, Theodore, Julien Bara-

beau & Co., H. Petitfils, and Mrs. George Sollinger are each required to answer the interrogatories numbered respectively 1, 2, 3, 4, 5, 6, 7, and 8, and to produce their titles as called for.

26 *Demurrer of Joseph Alcide Provost and other defendants.—Filed May 5th*, 1879.

In the circuit court of the United States for the district of Louisiana.
In equity.

N. L. McCarthy
vs.
Joseph Alcide Provost and others. } No. 8670.

The joint and several demurrer of Joseph Alcide Provost, Gracieuse Provost and her husband, Emile Mutrix, J. N. Webster, Mrs. George Sollinger, William F. Hudson, A. L. Provost, Narcisse Druilhet, M. L. Schexnayder, Aristide Landry, Antoine Morési, Marie Coralie Provost and her, husband A. C. Esteve, Otto A. Weber, Emma Henkel and her husband, Peter Henkel, G. Adolphe Pfaefflin, George Harris, Apolinaire Schexnayder, Marie Provost and her husband, Emile Druilhet, A. L. Monnot, James Briddell, Perry Johnston, Coralie Provost and her husband, Hypolite Larenaudie, Demas Mallet, Désiré Guiberteau, Alexander Monnin, John Petitfils, F. Petitfils,
27 John Brown, Guillaume Nathan, Lewis H. Whitworth, J. M. Weber, Paul Richard, Joseph Cloyd, Jacques Jacqui, Martin Withered, J. B. Withered, Moses Porter, Nore Washington, Mary Lassus and her husband, Pierre Lassusse, Louis Lageau, Julien Barbarin & Co., Laurent Hilaire, Paul Irvine, James Irvine, Gustine Griffin, Philips Richard, A. J. Simoneaud, P. C. Darby, Pierre Lindor, William Gausson, Alexander W. Edgar, Norbert Provost, an infant, by his guardian ad litem, Philip Bertaud, and Stanislas Provost, an infant, by his guardian ad litem, Apolinaire Schexnayder, defendants, to the bill of complaint of N. L. McCarthy, complainant.

These defendants, by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer, show:

28 That upon its face the bill purports to be a bill for the partition of the real estate therein described between the complainant (who claims to be entitled by inheritance from his grand parents, Nicholas and Marie Jeanne Provost, to one two-hundred and fortieth part of said real estate) and the defendants; that it appears from the face of the bill that the title set up by the said complainant is not admitted by the defendants but is disputed by them, and that said defendants, or some of them, claim title to said land not in common with said complainant, but adversely and to his exclusion from any title or inherent on said real estate, and these defendants say that they are advised that a partition suit cannot be made the means of trying a disputed title, and that before a court of equity will entertain a suit for partition, the legal title to a share in the lands to be divided must be established at law.

29 And for further ground of demurrer, these defendants show that the said bill is fatally defective on its face in not setting forth or averring the character and extent of the title and interest of the various defendants in and to the lands alleged to be held in common

between them and the complainant, and how the interest and title alleged of the respective defendants was derived; and these defendants say that the said bill is vague, indefinite, and insufficient to be answered to in other respects, among others, in this, that the said bill does not aver when the said Nicholas Provost and Marie Jeanne Provost died, or when the succession of the said Marie Jeanne and Nicholas were opened, the alleged inventory made, or who were heirs of said Nicholas and Marie Jeanne at the time of their death, or whether the defendants respectively are interested in the lands sought to be partitioned by inheritance or purchase, or to what extent respectively
30 such parties are or claim to be interested in said lands.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto, and pray the judgment of the court whether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

(Signed) KELLY & LAZARUS,
Of Counsel.

STATE OF LOUISIANA,
Parish of Iberia:

Before me, the undersigned authority, personally came and appeared Joseph Alcide Provost, one of the defendants, , being sworn, says that the foregoing demurrer is not interposed for delay, but that justice may be done.

(Signed) JOS. A. PROVOST.

Sworn to & subscribed before me this 1st May, 1879.

[SEAL.] (Signed) L. B. DELAHOUSSAYE,
Notary Public.

31 We hereby certify that, in our opinion, the foregoing demurrer is well fou ded in point of law.

(Signed) KELLY & LAZARUS.

Entry at rules.—Extract from chancery order book.—May rules, 1879.

N. L. McCARTY
vs.
J. ALCIDE PROVOST AND OTHERS. } No. 8670.

MONDAY, 5TH.

Joseph Alcide Provost, Gracieuse Provost and her husband, and other defendants, have this day, by their solicitors, Kelly & Lazarus, filed their joint and several demurrer to complainant's bill of complaint.

Entry at rules.—Extract from chancery order book.

N. L. McCARTY
vs.
J. ALCIDE PROVOST & ALS. } No. 8670.

MAY 9TH, 1879.

Now comes the complainant, by his solicitor Charles Louque,
32 and sets down for argument the demurrer of J. Alcide Provost and others, defendants herein, filed on the 5th day of May, 1879, through their solicitors Kelly & Lazarus.

Submission of demurrer.—Extract from the minutes.—April term, 1879.

NEW ORLEANS, *Saturday, May* 24, 1879.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

N. L. McCARTY
vs.
J. ALCIDE PROVOST ET ALS. } No. 8670.

The demurrer in this cause came on to be heard, and having been argued by counsel the court took time to consider—three days being allowed to submit briefs.

Decree entered & filed January 6, 1880.

In the circuit court of the United States for the district of Louisiana.

N. L. McCARTY
vs.
JOSEPH ALCIDE PROVOST AND OTHERS. } No. 8670.

33 This cause came on to be heard on the bill and the joint and several demurrer thereto of Joseph Alcide Provost and certain other of the defendants and was argued by counsel, whereupon, & upon consideration thereof, it was ordered, adjudged and decreed that the said demurrer be allowed, but that the bill be retained for the purpose of enabling the complainant to take such proceedings as he may be advised to establish at law the title averred and relied upon by him in his bill, provided, that if such proceedings at law are not begun within sixty days from the date of this decree, the said defendant may move herein for a final decree dismissing said bill as to them, with costs.

January 6th, 1880.

(Signed) EDWARD C. BILLINGS,
Judge.

Statement of counsel for complainant.—Filed February 17th, 1880.

34 The undersigned, of counsel for N. L. McCarty, complainant, hereby state that no proceedings at law have been instituted to establish the title of said McCarty, averred in the bill of complaint herein, to the property therein mentioned, and that said McCarty has been advised not to avail himself of the permission reserved to him in the decree herein rendered on January 6th, 1880, within the delay therein allowed, but to seek his remedy by appeal from any final decree that may be herein rendered against him.

February 7th, 1880.

(Signed) THOS. J. SEMMES,
CH'S LOUQUE,
Sols. for Compl't.

Final decree.—Entered & filed February 17, 1880.

In the circuit court of the United States for the district of Louisiana.
In equity.

N. L. McCARTY
vs.
J. ALCIDE PROVOST AND OTHERS. } No. 8670.

35 This cause came on to be further heard at this term upon the motion of counsel for J. Alcide Provost and other' of the defendants for a final decree. Whereupon, the court considering the decree heretofore rendered herein on the sixth day of January, 1880, allowing the demurrer of the said J. Alcide Provost and of the other defendants who joined with him in said demurrer, and whose names are therein set forth, and upon the said counsel presenting and filing the written statement of the counsel for complainant that no proceedings at law had been instituted to establish the alleged title of the said complainant, as set forth in his bill in this cause, to the property therein mentioned, and that the said complainant was advised not to institute such proceedings at law within the delay allowed by said decree of January 6th, 1880, and did not intend to avail himself of the permission reserved to him by said decree:

It is now ordered, adjudged, and decreed that as to Joseph
36 Alcide Provost and the other defendants named with him in the demurrer heretofore allowed herein as aforesaid, the bill of complaint herein be finally dismissed at complainant's costs.

February 17th, 1880.
(Signed) EDWARD. C. BILLINGS,
Judge.

Petition for appeal.—Filed June 4th, 1880.

United States circuit court.

N. L. McCARTY
vs.
JOSEPH ALCIDE PROVOST ET ALS. } No. 8670.

To the honorable the circuit court of the United States for the district of Louisiana:

The petition of the complainant in the above entitled cause with respect represents: That there is error, to his prejudice, in the decree rendered on the 6th day of Jan'y, 1880, and he is aggrieved thereby; wherefore he prays to be allowed an appeal to the Supreme Court of the United
37 States, returnable on the second Monday of October, in the year 1880, and that the amount of bond to be given by complainant be fixed by the court, and that the defendants be cited to appear and answer the appeal according to law, and for general relief.

(Signed) THOS. J. SEMMES,
CHARLES LOUQUE,
Sol's for Compl't.

Service of petition accepted and citation waived.
(Signed) KELLY & LAZARUS,
Counsel for Provost.

JUNE 4TH, 1880.

Service accepted and citation waived.
N. O., June 4, '80.
(Signed) GABRIEL FERNANDEZ,
Counsel for all other Def'ts.

A devolutive appeal is allowed in this case, as prayed for, returnable to the Supreme Court of the U. S. the 2' Monday of Oct., 1880, the appellant giving bond & security in the sum of $300.
June 4, 1880.
(Signed) EDWARD C. BILLINGS,
Judge.

38 *Bond for appeal.—Filed June 5th*, 1880.

UNITED STATES OF AMERICA:

Know all men by these presents that we, N. L. McCarthy, as principal, and C. H. Stewart, as surety, are held and firmly bound, jointly and severally, unto each and all the defendants named in the bill of complaint hereto annexed and made part hereof, in the sum of three hundred dollars, lawful money of the United States of America, to be paid to the said obligees, their heirs, executors, administrators, and assigns; for which payment well and truly to be made we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents., sealed with our seals and dated the 5th day of June, in the year of our Lord eighteen hundred and eighty.

Whereas the said L. N. McCarthy having heretofore, to wit, on the day of June, 1880, taken an appeal to the Supreme Court
39 of the United States from and to reverse the decree rendered on the day of , 18 , by the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, in the suit of N. L. McCarthy vs. Alcide Provost & als., No. 8670, of the docket thereof:

Now, the condition of the above obligation is, that if the above bounden principal shall prosecute his said appeal to effect and shall answer all damages and costs if he shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) N. L. McCARTHY, [L. S.]
Pr. CH'S LOUQUE, *Att'y.*
C. H. STEWART. [L. S.]

Approved.
(Signed) EDWARD C. BILLINGS,
Judge.

Agreement.—Filed Sept. 19th, 1880.

40 It is agreed between the undersigned that in the case of N. L. McCarty vs. J. A. Provost et als. the transcript of appeal to the Supreme Court of the U. S. shall consist of the bill, demurrer, and

other pleadings and entries in chancery order-book. Subpœnas are to be omitted, and all unnecessary and extraneous matter not necessary to a proper understanding and decision of the case.

It is agreed that the case shall be submitted on printed argument at the next term of the Supreme Court of the U. S.

(Signed) KELLY & LAZARUS,
Solicitors for Provost & others named in demurrer.
THOS. J. SEMMES,
Sol. for Compl't.

N. O., *Feb'y* 16, 1880.

41 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 40 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of N. L. McCarthy vs. Joseph Alcide Provost et als., No. 8670 of the docket, so far as the same now remain of record or on file in said court, excepting such matters as are omitted in accordance with the agreement of *of* the solicitors of the parties, respectively, on file and made a part of this transcript.

Witness my hand and the seal of said court, at the city of New Orleans, this 18th day of September, A. D. 1880.

[SEAL.] F. A. WOOLFLEY,
Clerk.

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 18th day of Sept., A. D. 1880.

EDWARD C. BILLINGS,
Judge.

(Indorsement on cover:) No. 889. L. N. McCarthy, appellant, vs. Joseph Alcide Provost et al. Louisiana C. C. U. S. Filed 29 September, 1880.

SUPREME COURT
FILED
DEC 29 1880
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

No. 889.

N. L. MACARTY, APPELLANT,

versus

JOSEPH ALCIDÉ PROVOST.

BRIEF FOR APPELLANT.

THOS. J. SEMMES,
For Appellant.

A W Hyatt, Print, 73 Camp St, N O—18,272.

SUPREME COURT OF THE UNITED STATES.

No. 889.

N. L. MACARTY, APPELLANT,

versus

JOSEPH ALCIDÉ PROVOST.

BRIEF FOR APPELLANT.

This case comes up on a demurrer sustained by the Circuit Court.

The bill is filed by one of the grand children and forced heirs of Nicholas Provost, and his wife Marie Jeanne, for a partition of a plantation in the parish of St. Mary; some of the defendants, especially Joseph Alcidé Provost, took possession of the property and appropriated to their use all the revenues thereof and refuse to account; and they claim title to the entire property by virtue of a *tax sale made in December*, 1873, *which the bill alleges to have been an absolute nullity* for the several reasons therein stated—p. 4.

1. For want of proper assessment.
2. The printed notice of demand was never made or published.
3. Movables on the place were not first seized as directed by the statute.
4. No notice of demand or of seizure was ever given.
5. No possession was ever taken by the tax collector.
6. No seizure was ever recorded in the Recorder's office.
7. The sale was not published, as required by law, three times in ten days.
8. The price bid, and pretended to have been paid, was not one-tenth of the value of the property.

9. J. A. Provost, one of the co-heirs, who was in possession and was in duty bound to preserve the property, had concocted the tax sale to defraud complainant and other co-heirs.

The bill also avers that the pretence of title by prescription has no foundation in fact, and sets forth a variety of facts to show that the possession of the co-heirs of the complainant, was never adverse to the title of complainant, until the tax sale of 1873.

It is contended that the allegations of the bill show, that defendants or some of them claim title to the property and, therefore, according to well settled principles of the Chancery Court, it will not entertain a suit for a partition until the question of title is determined at law.

I agree that a bill in Chancery for a partition cannot be made the means of trying a disputed title. The authorities cited in the brief of the appellee are abundant to that effect.

But the demurrer to this bill admits that the pretended tax title is void for the various causes stated in the bill, and that there is no foundation for a claim of title by prescription for the reasons set forth in the bill.

Illegality in the assessment of taxes is a radical defect, and render the sale null.

Woolfolk vs. Fonbine, 15 La. An. p. 15.
Thibodeaux vs. Keller, 29 La. An. 510.
Fix vs. Dierker, 30 La. An. 176.

Act No. 47, approved 14th March, 1873, requires tax collectors to sell, "after advertising three times within ten days in "the official journal, and in the country parishes, where such pub- "lications cannot be made, by public notice for such ten days." Section 1 Acts of 1873, p. 99. The failure to make the publication required by this law rendered the tax sale null.

Renshaw vs. Imboden, 31 La. An. 662.

The same section of the same act declares that in case of failure to pay the tax, the collector "may give ten days' written

"or printed notice to the owner or agent of the property assessed "to pay said tax; after which delay, if not fully paid, the said "tax collector may make a seizure of such property, by record- "ing a description of the same, with the amount due, in the "mortgage book of the parish where it is situated, and on the "fourth day of such recordation, shall proceed to sell said "property," etc.

The bill charges that no part of these provisions was complied with, and for these causes also, the pretended tax sale is null.

Person vs. O'Neale, 32 La. An. p. 229.

As to the title by prescription, the bill alleges that Ursin Provost, during the usufruct of Marie Jeanne Provost, resided on the land, with permission of the usufructuary, and, therefore, his possession was not adverse; that the usufructuary died in 1849, and adverse possession from that time to the filing of the bill would be insufficient to confer title by prescription, which, in a case of this kind, is thirty years. It further avers that prescription never commenced to run till 1873, because a joint owner cannot acquire the title of his co-owner by prescription, simply by remaining in possession; there must be some overt act, indicating a claim of exclusive right, and no act of that sort occurred till 1873, the date of the tax sale.

It is, therefore, clear that if the averments of the bill are true there is no title whatever in Alcidé Provost. On this demurrer, those averments must be accepted as admitted facts.

Now, if this were a suit in the State Courts, there would not be the slightest difficulty in sustaining it.

In the case of Denton vs. Woods, 19 La. An. p 357, which was a suit for partition, "the defendant asserting title and sole "ownership to the whole of the property described, excepted to "the plaintiff's action, which, he contended, should have been "one of revendication."

An action of revendication is a common law ejectment suit, styled in Louisiana a petitory action to try title to property.

The Court below overruled the exception and proceeded to a decree for a partition. The Supreme Court affirmed the decision, saying: "The joint ownership of the property is satisfactorily "proved, and the plaintiff, whether in possession of it or not, "had the legal right to resort to an action for partition." The Court cited 6 M. 284; 11 La. 426; 3 R. 44; 4 R. 453; 17 La. 248; 12 La. 154; 10 La. 458; 7 La. 442; 3 La. 186; Civil Code, Articles 1320, 1308, 1289 of new code, corresponding to 1243, 1231 1215 of old code.

I do not pretend that State legislation can control proceedings in a court of the United States, but I do undertake to say, that a court of the United States, sitting in Chancery, will give the same relief which a Court of the State would give, and that the Chancery Court will be guided in its decisions by the rules of property prescribed by the State laws.

This was decided in the case of Brine vs. Insurance Co. 96 U. S. 627. In that case the rules prescribed by the State law for sale of real estate, were accepted, although the rules thus accepted were unheard of in a Chancery Court.

On the same principle (I do not say the cases are identical) as an action of partition is an equity proceeding, no plea should defeat that action in a Court of the United States, which would not defeat it in a State Court. Of course I speak of pleas affecting the right to the action. The right to the action is conferred by the Civil Code, and is an incident to co-ownership, and is a rule of property as to co-owners.

Shall this right be denied in a Federal Court under circumstances which authorize a State Court to enforce it?

This is no question of a mere proceeding or mode of action; it is a question of substantial right. For if the appellee be right, a Court of the United States can afford no relief to the appellant. The partition, under the circumstances of this case, on the supposition that the appellee is right, cannot be sued for on the law side of the Court, nor can it be entertained on the Chancery side.

Article 1289 of the Civil Code says: "No one can be compelled to hold property with another, unless the contrary has been agreed on; any one has a right to demand the division of a thing held in common by the action of partition."

Article 1311. "Partitions can be sued for not only by the majority of the heirs but by each of them, so that one heir alone can force all the rest to a partition at his instance."

Article 1320. "It is not necessary to support the action of partition, that the co-heirs or the party commencing it should be in actual possession of the succession or of the thing to be divided; for among co-heirs and co-proprietors it is not the *possession* but the *ownership* which is the basis of the action."

"It cannot be stipulated that there never shall be a partition of a succession or of a thing held in common. Such a stipulation would be null and of no effect." Art. 1297.

Such an agreement for a limited time is valid, but it is assimilated to the case of partnership. Art. 1298.

But a donor or testator cannot order that the effects given or bequeathed shall not be divided for a longer period than five years. Art. 1300.

In view of this legislation, the right to partition is a substantial legal right, incident to joint ownership, and independent of possession. Why should not this right, conferred and conditioned as it is by the laws of Louisiana, be enforced in the Courts of the United States sitting in Louisiana? Am I to be told that a mere rule of practice is to override a substantial right? There is nothing in the organic structure of the Chancery Court which disables it from dealing with the question of partition, present it in what shape you will. If, therefore, the Court of Chancery has power to deal with and adjudicate on the subject matter, why should its powers be arrested in a case where the Court has undoubted jurisdiction, but owing to a peculiar system of law elsewhere, and for prudential reasons only, it has been the practice to abstain from proceeding to a decree, until a court of common law should pass judgment on a

particular question involved in the case? No such reason exists in Louisiana, where there is no distinction between law and equity. Hence, in Louisiana, a Court of the United States, sitting in chancery, will do many things which it would not do in common law States. In such States, the local law restrains the exercise of equity powers within the limits prescribed by usage, and, therefore, an equity Court, cannot go beyond the rules prescribed by equity practice without violating the law of the land. In Louisiana, the exercise of the power to proceed to a decree of partition in this case, will be in conformity with the local law, and a refusal of the Courts of the United States to entertain jurisdiction, is a refusal to administer the laws of the State, on the ground that a rule of procedure in the Chancery Court is of more importance than a rule of property established by State legislation.

Respectfully submitted,

THOS. J. SEMMES,

For Appellant.

FILED
DEC 4 1880
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

No. 889.

N. L. McCARTHY, APPELLANT,

VERSUS

JOSEPH ALCIDE PROVOST ET AL.

Brief on Behalf of Appellees.

HENRY B. KELLY,
of Counsel.

F. F. Hansell, Stationer and Printer, 30 Camp Street, New Orleans.

UNITED STATES SUPREME COURT.

Nos. 889.

V. L. McCARTHY, APPELLANT,

VERSUS

JOSEPH ALCIDE PROVOST ET AL.

Brief on Behalf of Appellees.

HENRY R. KELLY,
of Counsel.

UNITED STATES SUPREME COURT.

No. 889.

N. L. McCARTHY, APPELLANT,

VERSUS

JOSEPH ALCIDE PROVOST ET AL.

Brief on Behalf of Appellees.

STATEMENT OF THE CASE.

The bill in this cause is exhibited by N. L. McCarthy, claiming to be a citizen of Texas, against no less than one hundred and fifty-seven actual and a large number of nominal defendants, dispersed throughout the States of Louisiana, Florida, Tennessee, New York, and the Republic of France.

The bill avers, in substance, that Nicholas Provost and Marie Jeanne, his wife, died in the parish of St. Mary intestate, possessed of certain real estate on the Bayou Têche, which is described in the bill; that complainant is one of the grandchildren and forced heirs of said Nicholas and Marie Jeanne, and as such is entitled to one two hundred and fortieth part of the said real estate, which is averred to be worth over five thousand dollars; that the successions of said Nicholas and Marie Jeanne were opened in the probate court of the parish of St. Mary, and the lands described inventoried therein as part of the estate, and that they have never been disposed of; that the rents and revenues of the most valuable part of said lands are collected by Joseph Alcide Provost, and used exclusively for his own benefit, and are in danger of being lost to complainant and his co-heirs; that the property is not susceptible of division in kind, and that it will be for the benefit of defendants, as well as complainant, that the property should be sold to effect a partition; that complainant hoped that no dispute would have arisen concerning the property, and that he would have been peaceably allowed to divide it with the co-heirs and co-proprietors named in the bill, and that they would have consented to the request of complainant for a partition, but that the said defendants, and especially Joseph Alcide Provost, refuse to comply with said

request; that they and he at times pretend that the said property *is owned by them, and more especially the said Joseph Alcide Provost, to the exclusion of complainant*, pretending that a tax-sale was made on the 8th of December, 1873, of said property, and that the said tax title was duly confirmed by the State Auditor; and that at other times the said defendants allege that they have acquired said property by the prescription *acquirendi causa*, whereas the complainant charges the contrary thereof to be the truth, and that his rights in and to said property were never in any manner divested by the tax-sale referred to, or by the prescription *acquirendi causa*. The bill goes on to aver various matters in support of what is here charged, none of which are, for the purposes of this brief, necessary to be particularly set forth here.

The interrogating part of the bill goes on to propound to "Joseph Alcide Provost, and such as hold under him, and Ursin Provost," a series of interrogatories, not necessary to be specifically set forth in this brief, except that the sixth interrogatory inquires whether all the rents and revenues of the property since 1873 have not been received exclusively by Joseph Alcide Provost, and used for his own benefit; and that the eighth interrogatory inquires whether the defendants interrogated are not aware that the said land still belongs to complainant and his co-heirs, and knew not said fact

when *they entered into possession*, and requires the said defendants to *produce the titles on which they rely*. The number of defendants required by the the note at the foot of the bill to answer the interrogatories, and to produce the adverse titles upon which they rely, is sixty-eight.

The prayer of the bill is that the court will divide and allot two hundred and thirty-nine two hundred and fortieth parts among the defendants, and that complainant, his heirs and assigns, be decreed to be entitled to the remaining one two hundred and fortieth part, and that the property be sold, on certain terms, to effect the partition.

Demurrer of Joseph Alcide Provost and Others.

To this demand Joseph Alcide Provost and forty-nine other of the defendants filed their joint and several demurrer. For cause of demurrer they show that, upon its face,, the bill purports to be a bill for the partition of the real estate therein described between the complainant (who claims to be entitled, by inheritance from his grand-parents, Nicholas and Marie Jeanne Provost, to one two hundred and fortieth part of said real estate) and the defendants; that it appears on the face of the bill that the title set up by said complainant is not admitted by the defendants, but is disputed by them, and that said defendants or some of them claim title to said

lands not in common with the complainant, but adversely to him, and to his exclusion from any title or interest in said real estate; and these defendants say they are advised that a partition suit cannot be made the means of trying a disputed title, and that before a court of equity will entertain a suit for partition, the legal title to a share in the lands to be divided must be established at law. And for further ground of demurrer these defendants show that the bill is fatally defective on its face, in not setting forth or averring the character and extent of the title and interest of the several defendants in and to the lands alleged to be held in common between them and the complainant, and how the interest and title of the several defendants were derived respectively. And these defendants say that the said bill is vague, indefinite, and insufficient to be answered to in other respects, and among others in this, that it does not aver when the said Nicholas Provost and Marie Jeanne Provost died, nor when the succession of the said Nicholas and Marie Jeanne were opened, nor when the alleged inventory was made, nor whether the defendants respectively are interested in the lands sought to be partitioned by inheritance or purchase, or to what extent respectively said parties are or claim to be interested in said lands. Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto, and

pray the judgment of the court whether they shall be compelled to make any other or further answer to said bill, etc.

Upon argument the demurrer was allowed, but the bill was retained for the purpose of enabling the complainant to take such proceedings as he might be advised to establish at law the title averred and relied upon by him in his bill, providing that if such proceedings at law were not begun within sixty days from the date of the decree, the demurring defendants might move for a final decree, dismissing the bill as to them with costs. Transcript, p. 10.

Before the delay allowed for beginning proceedings at law had expired, a written statement, signed by counsel for complainant, was filed in the cause, to the effect that no proceeding at law had been instituted to establish the title averred by complainant, and that he had been advised not to avail himself of the permission reserved to him in said decree, but to seek his remedy by appeal from any final decree that might be rendered against him. Transcript, p. 10.

Thereupon a final decree was rendered dismissing the bill as to the demurring defendants, from which complainant has taken this appeal.

ARGUMENT.

1. Upon the point that a partition suit cannot be made the means of trying a disputed title, as is plainly sought to be done in the present instance, the authorities, English and American, are all one way, and are overwhelmingly conclusive.

In 1 Story's Equity Jurisprudence, twelfth edition, section 653, No. 4, the doctrine is laid down in so many words, thus: "A partition suit cannot be made the means of trying a disputed title;" and a number of authorities, English and American, are cited in support of the rule, to some of which we will refer more particularly further on.

And so in Adams' Equity, sixth American edition, marginal page 230, No, 1, it is said: "The title of complainant must be undisputed, otherwise the bill will be dismissed, or else retained until the title has been settled at law." A list of twenty-seven American cases is given in support of the doctrine.

In Hosford vs. Sherwin, 5 Barb, S. C., it is said: "The court will not entertain a bill for partition where the legal title is in dispute."

In Riverview Cemetery Company vs. Turner and others, 24 New Jersey Equity Reports 18, the chancellor said: "If in a suit for partition the complainant's title is denied, and the title which is disputed is a legal one, the court may dismiss the

bill, or it may *ex gratia* retain the cause, to afford the complainant an opportunity to settle his title at law; but it will not do more."

In Dewitt vs. Ackerman, 2 C. E. Green, N. J. Ch. Reports, 215, the chancellor said: "This is not a proper case for partition. The defendant is in possession claiming title under color of a deed covering the entire premises. A bill for a partition will not lie when the title is denied or depends on doubtful facts or questions of law." The chancellor cites Manners vs. Manners, 1 Green Ch. R. 284; Van Riper vs. Berdin, 2 Green Ch. R. 132; Wilkin vs. Wilkin, 1 John. Ch. R. 111; Coxe vs. Smith, 4 John, Ch. R. 271; 2 Barb. Ch. Pr. 285.

In Manners vs. Manners, 1 Green, N. J. Ch. R. 284, the complainants filed their bill for the partition of a farm, to one equal undivided fourth part of which they claimed title, under the will of John Manners, deceased. The defendants by their answer insisted that the complainants under the will acquired no title to the premises whereof partition was to be made. The case was submitted upon writen argument, *both parties desiring that the question of title should be settled by the court.* The chancellor says: "It will be seen that this is a case of disputed title to lands, and the reason for declining partition by defendants is that the complainants have no rights in the premises. This is not the action nor the forum to try a question of

this character; *and every rule of propriety forbids that a suit for partition should be made a mode of trying the legal title to lands.*"

The English authorities are equally conclusive.

In Worthleigh vs. Lascombe, Amb. 612, where the bill for partition was upon a legal title not established at law and denied by the answer, discovery was refused.

By Sir Sohn Rolt's act, 25 and 26 Vic. C. 52, it is provided that *the court of chancery is to determine every question of law and fact cognizable in a court of common law, on the determination of which the title to relief in equity depends.* This statute obviously gives to the jurisdiction of the English courts of chancery, as now constituted, a scope which the jurisdiction of the English chancery, prior to the passage of the act, did not possess, and which the jurisdiction of the Federal Courts of chancery does not now, and never has possessed. But, even as expanded and extended by this statute, the English courts of chancery still hold that they are without jurisdiction to try a disputed title to real estate, or to any legal interest in real estate, in a suit for partition.

In Slade vs. Barlow, 7 L. R. Equity 296, complainant filed a bill, claiming against defendant partition of certain lands alleged to be held in common; but before a partition could be ordered, it appears

that it was necessary that the *title* of the complainant to an undivided share in the land should be passed upon. Counsel for defendant said: "We object *in limine* that this is an ejectment bill. Such a bill was, by Vice-Chancellor Stuart, ordered to be retained for a year, with liberty for plaintiff to bring an action; and this decision was affirmed by the lord justices. Bolton vs. Bolton." * * The vice-chancellor: "I shall of course follow the precedent that has been made by Vice-Chancellor Stuart, and the Court of Appeal in Bolton vs. Bolton. It has been said that this court is perfectly competent to try the questions which have been raised; but in truth that is not the state of the law. Seeing that the real object of the suit is to recover possession of the land under a legal title, and that all the questions raised are legal questions, it would certainly be straining Sir John Rolt's act very far to say that these questions could be determined by the court of chancery. Following the above decision, I shall direct the bill to be retained for a year, with liberty to bring such action at law as they may be advised. * * *Here there is litigation.* The suit for partition is based on *the assumption that there is no litigation.* The reason why this bill is retained is this, that it may possibly turn out that plaintiffs are tenants in common. I retain the bill only in order that in that event this suit may be made available."

In Giffard vs. Williams, 5 Chancery Appeal Cases, 546, the bill was filed by persons claiming, under a certain will, to be entitled to an undivided moiety of certain lands, and prayed for a declaration that the complainants were so entitled, and for a partition. The title alleged by plaintiffs was a legal title. They had not been in possession for many years, and for many years the rent had been paid to the defendants by the tenant of the field. But plaintiffs alleged that certain rent paid defendants had been paid as rent for a moiety of the field, while defendants alleged that it was a quit rent on their estate generally. [The Court will bear in mind that in the present case it is *averred in the bill* that Joseph Alcide Provost has for many years collected the rent of the most valuable of the lands described in the bill for his own use.] In the case to which we are now referring, Giffard vs. Williams, the vice-chancellor, Stuart, made a declaration that the plaintiffs were entitled, and decreed a partition, as reported in 8 L. R. Eq. 194. The defendants appealed. Mr. Morgan, Q. C., for the defendants, contended that the court ought not to entertain a partition suit when plaintiffs' claim was disputed and was certainly very doubtful. The question was purely legal, and the plaintiffs ought to establish their right at law. Hatherly, L. J., said: "*It would not be proper for this court, under color of making a decree for a partition, in fact to*

decide the legal right to this land. The plaintiffs had certainly not been in possession for many years, unless it could be shown that the payment of two pounds annually by the defendants to the plaintiffs and those under whom they claimed was made in respect of this land. The defendants had exercised all the rights of owners, and there was nothing to show any tenancy in common, except the payment of this two ponnds. The evidence was not, in their lordships' opinion, conclusive, and the question must be decided by a jury. The order would be to retain the bill for a year, with liberty for plaintiffs to bring such action as they might be advised."

In Bolton vs. Bolton, 7 L. R. Eq. 298, Sir C. J. Selwyn, L. J., said: " * * I think it unnecessary to decide the question which arises upon the construction of Sir John Rolt's act. Apart from this act, the course of the court is, in my opinion, correctly laid down by Lord Justice Knight Bruce, when vice-chancellor, in Potter vs. Walter, 2 De Gex and Smailes, 410, where he says that it has been stated, as *a simple proposition, that a bill for a partition cannot be made the means of trying a disputed title.* That is according to my experience, and it is fortified by counsel of great eminence, who being asked whether they knew of any instance where a disputed title had been tried by means of a bill of partition, were unable to bring forward any such case."

2. The bill is defective on its face, in not setting forth or averring the character and extent of the title and interest of the several defendants in and to the land alleged to be held in common between them and the complainant.

In a note by the American editor to Agar vs. Fairfax, in White & Tudor's Leading Cases in Equity, page 536, vol. 2 (Law Library, vol. 61), it is said that equity cannot decree a partition unless the *titles of both* parties are clear. Garrett vs. White, 3 Ired. Eq. 13.

The bill must in general allege seizin both in complainant and defendant. Adams' Eq. 6 Am. edition, page 458, No. 1; Maxwell vs. Maxwell, 8 Ired. Eq. 25; Adams vs. Ames Iron Co., 24 Conn. 230.

3. The bill is defective, because it does not set forth when the said Nicholas Provost and the said Marie Jeanne Provest died, nor when the succession of said Nicholas and the said Marie Jeanne were opened, nor when the alleged inventory was made, nor whether the defendants respectively are interested in the lands sought to be partitioned by inheritance or purchase, nor to what extent respectively they are or claim to be interested in said lands.

In averring title in pleading it is not only necessary to set forth whether it is by purchase or by descent, but if by descent, it is necessary that

all the links which constitute the chain of descent should be stated. Milford's Plead. 136, No. —; 7 Sim. 373, Baker vs. Harwood.

Nothing of the kind is done in the bill in this case, either as to plaintiff or defendants. The bill does not even state when Nicholas and Marie Jeanne Provost died; whether they died simultaneously, or, if not, which of the two died first, and how long before the other. Yet the bill does aver that they both died possessed of all the lands, though the character of the possession, whether as owners, usufructuaries, or otherwise, is not specified.

It is admissible to state here, by way of hypothesis, consistent with the averments of the bill, that Nicholas Provost may have died as long ago as 1816, and that Marie Jeanne Provost may have died in 1849. Whatever the dates of the deaths, they should be stated in the bill. If they had been so stated, and the foregoing hypothesis be correct, it would then appear that this bill against one hundred and fifty-seven defendants—men, women, and children scattered over the States of Louisiana, Florida, Tennessee, New York, and the Republic of France— is exhibited for the first time in this court, sixty-three years after the death of Nicholas Provost, and thirty-two years after the death of Marie Jeanne Provost; and that this multitudinous mass of defendants are summoned to the bar of this Court, some of them from the ends of the earth, at

the suit of complainant, who, according to his own averment, is entitled to the one two hundred and fortieth part of property worth over five thousand dollars, or to over twenty dollars and eighty-one cents; and that his title, even to that amount, is so gravely disputed, according to his own showing, that the bill exhibited by him for its recovery will not lie, but must either be dismissed at his cost, or be retained until such time as he can establish his title to it at law, contradictorily with the alleged owners of the other two hundred and thirty-nine two hundred and fortieths.

It was argued in the court below, on behalf of complainant, that the Circuit Court of the United States, sitting in Louisiana, administers the law of Louisiana as to property, and that if it were to disregard that law, it would, in the language of Mr. Justice Miller, in Brine vs. Insurance Company, 96 U. S.: "introduce into the jurisprudence of the State the discordant elements of a substantial right which is protected in one set of courts, and denied in the other, with no superior to say which is right." With this dictum we cordially concur.

It was also argued below that the dispute as to the title of the property to be divided offers no impediment to the institution of a partition suit in Louisiana, nor is possession necessary to enable complainant to sue. The court will adjudicate on the title set up by the defendant as a court of

equity does when the title is equitable only, and in support of this position reference was made to Gravier vs. Livingston, 6 M. 401, and Denton vs. Woods, 19 A. 357, which clearly establish that in the State courts of Louisiana, where no distinction between law and chancery is known or recognized, and by whose statutes regulating procedure the largest latitude is allowed with regard to the cumulation in one suit of various causes of action, a petitory action for an undivided portion of an estate may be cumulated with a prayer for its partition. So in the case from 22 How. p. 13, Parker vs. Kane, relied upon in argument in the lower court, it is stated by Mr. Justice Campbell, that: "The statutes of Wisconsin provide for the partition of estates held in common, by a bill of equity, filed in the Circuit Court of the county in which the land is, and for a sale of the premises when a partition would be prejudicial to the owners. *The court upon the hearing may declare the rights, titles, and interests of the parties to the proceedings*, and order a partition."

There could hardly be, however, a greater juridical fallacy than to infer from the fact that the courts of any State, under the statutes of the State regulating their jurisdiction and method of procedure, may, in one proceeding try the title and decree the partition of property, that, therefore, the Circuit Courts of the United States, sitting in

equity in such State, may allow an action of ejectment to try title to property to be embodied in bill for its partition.

In Dupuy vs. Bemiss, 2 A. 512, Mr. Chief Justice Eustis said: "It is the settled jurisprudence of the United States, that the jurisdiction of their courts is not limited or regulated by the local remedies of the different States."

In Wayman vs. Southard, 10 Wheaton, p. 49, Mr. Chief Justice Marshall said: "That the power claimed for the State" to regulate procedure in the Federal Courts "is not given by the 34th section of the Judiciary Act has been fully noted in the preceding part of this opinion. That it has not an independent existence in the State Legislatures, is, we think, one of those political axioms an attempt to demonstrate which would be a waste of argument not to be excused. The proposition has not been advanced by counsel in this case, and will, probably, never be advanced. Its utter inadmissibility will at once present itself to the mind, if we imagine an act of a State Legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers in executing their judgments. No gentleman will, we believe, be so extravagant as to maintain the efficacy of such an act. It seems not much less extravagant to maintain that the practice of the Federal Courts and the conduct of their officers can be indirectly regulated by the

State Legislatures, by an act professing to regulate the proceedings of the State Courts, and the conduct of the officers who execute the process of those courts. It is a general rule that what can not be done directly from defect of power, cannot be done indirectly."

In 1835, when Livingston vs. Story, 9 Pet. 632, the leading case in reference to the equity jurisdiction of the Federal courts sitting in Louisiana, was decided, the only Federal court in Louisiana was a district court, with ordinary circuit court powers. The case was elaborately argued by very eminent counsel, Mr. Key, and Mr. White, of Florida, on behalf of Mr. Livingston, contending that the Federal court in Louisiana was vested with all the equity jurisdiction and power exercised by other Federal courts, and Mr. Clay and Judge Alex. Porter, for Mr. Story, very strenuously denying the existence of such jurisdiction and power.

The Court said, p. 53: "The argument addressed to this court has been confined principally to the general question whether the District Court of the United States in Louisiana has equity powers; and if so, what are the modes of proceeding in the exercise of such powers. The great earnestness with which this power has been denied at the bar to the District Court may make it proper briefly to state the origin of the District Court of that State, and the jurisdiction conferred upon it by the laws

of the United States. When the Constitution was adopted and the courts of the Union organized and their jurisdiction distributed, Louisiana formed no part of this Union. It is not reasonable, therefore, to conclude that any phraseology has been adopted with a view to the peculiar local system of laws in that State." After giving an account of the laws establishing the District Court in Louisiana, and regulating the mode of procedure therein, the Court go on to say: "And such manner of proceeding is pointed out by the process act of 1792, 2 Laws U. S. 299, which declares that the mode of proceeding in suits at common law shall be the same as now used in said courts respectively, in pursuance of an act entitled 'An Act to regulate process in the courts of the United States,' viz.: the same as are now used and allowed in the Supreme Courts of the respective States, 2 Laws U. S. 72, and in suits in equity * * * according to the principles, rules, and usages which belong to courts of equity * * as contradistinguished from those of common law; subject to such alterations by the courts as may be thought expedient, etc."

"From this view of the acts of Congress, it will be seen that * * * Louisiana when she came into the Union had organized therein a District Court of the United States having the same jurisdiction, except as to appeals and writs of error, as the Circuit Courts of the United States in

other States, and that in the modes of proceeding that court was required to proceed according to the principles, rules, and usages which belong to courts of equity as contradistinguished from courts of common law, and whether there were or were not, in the several States, courts of equity, proceeding according to such principles, made no difference, according to the construction uniformly adopted by this Court.

In the case of Robinson vs. Campbell, 3 Wheat. 222, it is said, that in some States of the Union no Court of Chancery exists to administer equitable relief. In some of the States, courts of law recognize and enforce in suits at law all equitable claims and rights which a court of equity would recognize and enforce; and in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law; and a construction, therefore, that would adopt the State practice in all its extent would at once extinguish in such State the exercise of equitable jurisdiction. *That the acts of Congress have distinguished between the remedies at common law or in equity, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles.* So, also, in the case of the United States vs. Howland, 4 Wheat. 414, the bill was filed on the equity side of the Circuit Court of the United

States in Massachusetts, in which there was no Court of Chancery; and in answer to this objection the court say: "As the courts of the Union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Maasachusetts must be the same as in other States." And in Payne vs. Hook, 7 Wall. 430, decided in 1868, the Court said: "We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. *If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice in their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal Courts is the same as the High Court of Chancery of England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union.*"

It is respectfully submitted that the decree of the lower court should be affirmed.

HENRY B. KELLY,
of Counsel.